LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 3 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1425

GROVER C. HILL, ET UX MARY K. HILL, on behalf of themselves and all stockholders of MOONEY CORP. & MOONEY AIRCRAFT, INC.

and

GROVER C. HILL, ET UX MARY K. HILL, derivatively on behalf of MOONEY CORP. & MOONEY AIRCRAFT, INC.,

Petitioners

v.

HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,

Respondents

Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

L. N. D. WELLS, JR.
1601 National Bankers Life Bldg.
Dallas, Texas 75201
Attorney for Petitioners

Of Counsel:

MULLINAX, WELLS, MAUZY & COLLINS
1601 National Bankers Life Bldg.
Dallas, Texas 75201

OTTO B. MULLINAX
1601 National Bankers Life Bldg.
Dallas, Texas 75201

ALVIN A. OHM
1601 National Bankers Life Bldg.
Dallas, Texas 75201

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS 75215 — 428-8385

INDEX

	Pages
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement	4
I. Summary of Proceedings	5
II. The Decisions Below	7
Reasons for Granting the Writ	9
Conclusion	13
Appendix A	1a
Appendix B	1b
Appendix C	1c
Appendix D	1d
Appendix E	1e

CITATIONS

Cases: :	Pages
Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959)	11
Bernhard v. Bank of America Nat'l. Trust and Sav. Ass'n, 19 Cal. 2d 807, 122 P. 2d 892 (1942)	10
Cohen v. Superior Oil Co., 16 F. Supp. 221 (D. Del. 1936), aff'd., 90 F. 2d 810 (3rd Cir.), cert. den., 302 U.S. 726 (1937)	12
Culpepper v. Reynolds Metal Co., 296 F. Supp. 1232 (N.D. Ga. 1968)	11
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	11
Dimick v. Schiedt, 293 U.S. 474 (1935)	10
Fromberg, Inc. v. Gross Manufacturing Co., 328 F.2d 803 (9th Cir. 1964)	13
Hayes v. Seaboard Coast Line R.R. Co., 46 F.R.D. 49 (1969)	11
Lindsey v. Leavy, 149 F.2d 899 (9th Cir. 1945)	13
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1	5
Ross v. Bernhard, 396 U.S. 531 (1970)	4, 10
State of Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967)	10

Citations—(continued)

	Pages
Technograph Printed Circuits v. Packard Bell Electronics Corp., 290 F. Supp. 308 (C.D. Calif. 1968)	12
Constitutional Provisions and Statutes:	
15 U.S.C. §77(e)	2, 4, 5, 6
15 U.S.C. §78j(b)	2, 4, 5, 6
Rule 38(a), Federal Rules of Civil Procedure	11
Rule 56(c), Federal Rules of Civil Procedure	4
17 C F R 240.10b-5	2, 4, 5, 6
U.S. Constitution, Amend. V	4, 9
U.S. Constitution, Amend. VII	4, 8, 10, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

GROVER C. HILL, ET UX MARY K. HILL, on behalf of themselves and all stockholders of MOONEY CORP. & MOONEY AIRCRAFT, INC.

and

GROVER C. HILL, ET UX MARY K. HILL, derivatively on behalf of MOONEY CORP. & MOONEY AIRCRAFT, INC.,

Petitioners

v.

HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,

Respondents

Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

OPINIONS BELOW

The Fifth Circuit opinion to which this Petition is addressed was filed on December 3, 1970, reported at 435 F. 2d 59 (5th Cir. 1970), Docket No. 29585, and is printed as Appendix E to this Petition (*infra,* pp. 1e to 14e). The Findings of Fact and Conclusions of Law and Final Judgment of the District Court in the present case filed January 20, 1970, are printed as Appendix C and Appendix D to this Petition (*infra,* pp. 1c to 3d). The

Order of Permanent Injunction entered by the District Court on March 27, 1969, are printed as Appendix B to this Petition (*infra,* pp. 1b to 3b).

JURISDICTION

This is a petition for certiorari to review a decision of the Fifth Circuit in an action brought in the District Court by Hill and his wife, as individuals, and as representatives of all stockholders in Mooney Corp. and Mooney Aircraft, Inc., and, derivatively, in behalf of the two corporations, against Hal Francis Rachal, the Chairman of the Board and President of both corporations, and Edward B. Hunnicutt, their Secretary-Treasurer, to recover damages sustained as a result of violations of Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5, 17 CFR 240.10b-5, promulgated thereunder, and Section 5 of the Securities Act of 1933, 15 U.S.C. §77e. Among the issues presented is whether a party has a right to jury trial in cases arising under the Securities Exchange Act of 1934 and the Securities Act of 1933 when the issue to be decided has been adjudicated adversely to him in a prior proceeding in which he had a full and fair opportunity to prove a claim or defense and has failed in that effort.

The decision of the Fifth Circuit was filed on December 3, 1970. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the due process clause of the Fifth Amendment of the United States Constitution requires mutuality of estoppel prior to application of the doctrine of collateral estoppel where the party against whom the judgment is sought to be used had a full and fair opportunity to be heard on the issues?

2. Is there a right to trial by jury in suits arising under the Securities Act of 1933 and the Securities Exchange Act of 1934 when suits of such nature were unknown under the common law when the Seventh Amendment to the Constitution was adopted.

3. Was it error for the District Court to grant summary judgment on the basis that the Respondents were collaterally estopped from relitigating the same issues that had been decided against them in a prior proceeding in which they had a full and fair opportunity to present their case?

4. Was it error for the Court of Appeals to vacate the District Court's order of summary judgment upon the basis that the findings of fact and conclusions of law do not contain a ritualistic statement that there is "no genuine issue as to any material fact?"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process clause of the Fifth Amendment to the Constitution, U. S. Constitution, Amendment V, the Seventh Amendment to the Constitution, U.S. Constitution, Amendment VII, Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5, 17 CFR 240.10b-5, promulgated thereunder, Sec. 5 of the Securities Act of 1933, 15 U.S.C. §77e, and Rule 56(c), Federal Rules of Civil Procedure. These are printed as Appendix A to this petition (*infra,* pp. 1a to 5a).

STATEMENT

The question of the right to jury trial of corporate officers accused of violating 15 USC §80-a-1 et seq. by converting corporate assets, misconduct, misfeasance, bad faith and gross negligence was recently decided by a closely divided court. *Ross v. Bernhard,* 396 U.S. 531 (1970). The majority found the right to jury trial in the Seventh Amendment in the light of the issues there to be tried.

There questions traditional to the common law of conversion, negligence, "ordinary breach of contract and gross negligence" were at issue, 396 U.S. at 532 and ~~738~~ 542.

Here the questions are purely statutory. Did

the corporate officers engage in conduct proscribed by the Securities Acts?

The questions presented on this petition are important not only in the definition of the requirements of the Seventh Amendment; but also to the functioning of important social legislation. Congress has enacted an elaborate statutory scheme of securities regulation. It has not seen fit specifically to provide for jury trial. Here as in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 48 and 49:

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. [Payments for monies lost through stock manipulation] are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

I. Summary of the Proceedings

On January 9, 1969, the Securities and Exchange Commission (S.E.C.) filed a complaint in the Western District of Texas against Mooney Aircraft, Inc. and Mooney Corp. alleging a manipulative scheme and other related conduct violative of Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. §§77e and 77q(a), Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, and sought a permanent injunction against further

violation. A final judgment of permanent injunction was entered by consent against the corporations on January 20, 1969. Respondents Rachal and Hunnicutt demanded and received a full trial in which they asserted and had full opportunity to present their defenses. On March 27, 1969, the District Court entered an order of permanent injunction against the Respondents.

On February 3, 1969, Hill and his wife (Petitioners) brought this present action, individually, and as a representative of all stockholders in the two corporations, and derivatively in behalf of the two corporations, against Rachal and Hunnicutt, alleging the same manipulative scheme and related conduct described in the S.E.C.'s complaint and seeking to recover damages sustained as a result of violations of Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (Appendix A, *infra,* p. 2a), Rule 10b-5, 17 CFR 240.10b-5 thereunder (Appendix A, *infra,* pp. 2a to 3a) and Section 5 of the Securities Act of 1933, 15 U.S.C. §77e (Appendix A, *infra,* pp. 3a to 4a). On the basis of collateral estoppel, Petitioners moved for summary judgment on all issues of liability and damages with respect to the derivative action. The district court granted Petitioners' motion for summary judgment for the purchase price of their shares of the stock of the corporations and for the sums of money paid to the Respondents by the corporations involved. Appendix D, *infra,* pp. 1d to 3d).

In its Findings of Fact and Conclusions of Law

entered in conjunction with the order granting summary judgment (Appendix C, *infra,* pp. 1c to 8c), the District Court found that the issues of fact presented by the S.E.C. complaint with respect to violations of the security laws of the United States and the fact issues presented by the complaint in the instant action were identical; that the Respondents had a full and fair trial, with full opportunity to present their defenses, on the identical issues in the prior S.E.C. action and that Respondents presented no new, other or different evidence than was presented by them in the prior S.E.C. action; and that Respondents failed to indicate that any such evidence exists which could not have been produced in the former trial.

II. The Decisions Below

The District Court held that Respondents were collaterally estopped to deny that their conduct violated the security laws of the United States and that the Petitioners were entitled to summary judgment on the issue of liability. The District Court awarded $1,285.30 to Hill and his wife, that being the purchase price of the shares of stock acquired by them, dismissed the class action for failure to present common questions of fact and awarded Mooney Aircraft, Inc. and Mooney Corporation $454,000 from Respondent Rachal. This represented the amount he and members of his family received from the resale of stock to the corporations. $5,960 was awarded against Respondent Hunnicutt, representing what he received from the resale of stock to the corporations.

On appeal, the Fifth Circuit vacated the District Court's order of summary judgment on the basis that the Findings of Fact and Conclusions of Law did not contain the phrase that there were no genuine issues of material fact. The Court of Appeals recognized the principle of collateral estoppel, that a party who has had his day in court, has been given a full and fair opportunity to present his case and suffers an adverse decision, should not be allowed to relitigate the matter in another case. The Court also recognized that the modern trend has been to discard the rule as to mutuality of parties and that requirements of mutuality need not be met for collateral estoppel to be applied in an action presenting a federal question in the courts of the United States. The Court of Appeals did not dispute the fact that the S.E.C. action and Petitioners' action were identical in form and substance. The Court also did not dispute the fact that both actions were heard in the same court before the same judge. It nevertheless felt that this case contained an overriding consideration of fairness to the Respondents which could possibly dictate a different result if the Respondents were allowed to present their claims to a jury, but did not state what that consideration could possibly be, other than the denial of trial by jury.

The Court of Appeals held that in actions between private litigants arising under the federal securities laws, the Respondents were entitled to trial by jury as a matter of right under the Seventh Amendment to the United States Constitution. It

held that the central issue is whether a litigant can lose his constitutional right to a jury trial when the issue has been adjudicated adversely to him in a prior trial in which there was no right to a trial by jury and the Petitioners were not parties.

The Court of Appeals nowhere noted that the Findings of Fact and Conclusions of Law filed by the District Court contained an abundance of statements which are equivalent to a statement that there is no genuine issue as to any material fact. The court of Appeals did, however, proceed to consider each defense relied upon by the Respondents and did rule that each was insufficient as a matter of law. The Court of Appeals failed to note that since the only question involved in the case was one of law, there being no dispute as to material issues of fact, there could be no claim by the losing party that the granting of a motion for summary judgment deprives him of a jury trial.

REASONS FOR GRANTING THE WRIT

1.

The Court should rule that the due process clause of the Fifth Amendment of the United States Constitution does not require mutuality prior to application of the doctrine of collateral estoppel where the party against whom the judgment is sought to be used had a full and fair opportunity to be heard on the issues. Specifically, this Court should rule that as long as the party against whom the

judgment was sought to be used had a full and fair opportunity to be heard on the issue, there is no constitutional impediment to the application of the doctrine of collateral estoppel where there was no mutuality. A party should have a full and fair day in court to be heard on the issue but should not be able to litigate that issue indefinitely. *State of Maryland v. Capital Airlines, Inc.*, 267 F.Supp. 298 (D.Md. 1967); *Bernhard v. Bank of America Nat'l. Trust & Sav. Ass'n.*, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

2.

The Court should rule that there is no right to trial by jury in suits arising under the Securities Act of 1933 and the Securities Exchange Act of 1934. As this Court stated in *Ross v. Bernhard*, 396 U.S. 531 (1970), the Seventh Amendment right to a jury trial ". . . depends on the nature of the issue to be tried rather than the character of the overall action." In this case, the nature of the issue is one which is governed solely by the Securities Act of 1933 and the Securities and Exchange Act of 1934. Thus, there was no right to a jury trial of such issue under the common law since it basically is a creature of statutory law of recent origin. ". . . [T]he reach of the [Seventh] Amendment is limited to those actions which were tried to the jury in 1791, when the Amendment was adopted." 396 U.S. at 543. See also *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) and James, "Right to a Jury Trial in Civil Actions," 72 Yale L.J. 655 (1963).

Neither *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) nor *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500 (1959) govern the question of whether Respondents have a right to jury trial in actions for damage under the Securities Act of 1933 and the Securities Exchange Act of 1934. Rule 38(a) of the Federal Rules of Civil Procedure defines Respondents' right to a trial by jury in this case, and accordingly, Respondents have no such right unless it arises under the Seventh Amendment or a United States statute. Neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 grants the right to jury trial in suits thereunder. The Seventh Amendment to the United States Constitution preserves the right to trial by jury which existed under the common law when that amendment was adopted. Suits based upon violations of the federal securities laws were unknown under the common law and have their origin solely in the statutes enacted in the 1930's. These statutes reflect the strong Congressional intent to protect the public in an area where no adequate remedies existed under the common law. Petitioners are not aware of any reported decision directly in point. Compare *Culpepper v. Reynolds Metal Co.,* 296 F. Supp. 1232 (N.D.Ga. 1968); *Hayes v. Seaboard Coast Line R.R. Co.,* 46 F.R.D. 49 (1969).

3.

The Court should grant the writ to consider whether the courts may grant summary judgment on the basis that the Respondents were collaterally estopped from relitigating the same issues that had

been decided against them in a prior proceeding in which they had a full and fair opportunity to present their case. The Court should rule that disputes as to the existence of genuine issues of material facts should be decided by the courts and not by juries. No one is entitled in a civil case to trial by jury unless there are issues of fact to be determined. The Court should consider whether it is permissible for the courts to apply the doctrine of collateral estoppel on a motion for summary judgment by one not a party to the previous litigation, if there has been a full and fair trial on the identical issues, a final judgment thereon and if the party against whom it is sought to be invoked has no new, other or different evidence than was presented in the previous trial, which he could not then have produced, and if the courts find to that effect. *Technograph Printed Circuits v. Packard Bell Electronics Corp.*, 290 F.Supp. 308 (C.D. Calif. 1968); *Cohen v. Superior Oil Co.*, 16 F.Supp. 221 (D.Del. 1936), aff'd., 90 F.2d 810 (3rd Cir.), cert. den., 302 U.S. 726 (1937).

4.

The Court should consider whether it is necessary that an order of summary judgment made upon the basis of findings of fact and conclusions of law contain a ritual statement that there is no genuine issue as to any material fact. Since a summary judgment presupposes that there are no triable issues of fact, findings of fact and conclusions of law are not required. The Court may make such findings and when made they are helpful to

the appellate courts. A failure to make findings is not error. *Lindsey v. Leavy,* 149 F.2d 899 (9th Cir. 1945). Unless litigation is to be reduced to mere verbal ritualism, the abundance of statements contained in the Findings of Fact and Conclusions of Law filed by the District Court (Exhibit "C", *infra,* pp. 1c to 8c) are equivalent to a statement that there is no genuine issue as to any material fact. *Fromberg, Inc. v. Gross Manufacturing Co.,* 328 F.2d 803 (9th Cir. 1964).

CONCLUSION

Because the proceedings below have consequences in significant variance with decisions of the various Circuits and because of the importance of these issues:

It is respectfully submitted that the Court should grant Petitioners' prayer for a Writ of Certiorari.

Respectfully submitted,

MULLINAX, WELLS, MAUZY & COLLINS
1601 National Bankers Life Bldg.
Dallas, Texas 75201

By .....
L. N. D. Wells, Jr.

By .....
Otto B. Mullinax

By .....
Alvin A. Ohm

Attorneys for Petitioners

APPENDIX A

Constitutional and Statutory Provisions

The relevant provisions of the United States Constitution are as follows:

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The relevant provision of the Securities Exchange Act of 1934, as amended, is as follows:

Sec. 10 (b) [15 U.S.C. §78j (b)]

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 C.F.R. 240 .10b-5, promulgated thereunder:

Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light

of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The relevant provision of the Securities Act of 1933, as amended, is as follows:

Section 5 [15 U.S.C. §77e]

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any

security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

The relevent provision of the Federal Rules of Civil Procedure is as follows:

Fed. R. Civ. P. 56(c)

SUMMARY JUDGMENT

* * * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to

the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

APPENDIX B

In The

District Court of the United States
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action File No. SA69CA-4

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff

v.

MOONEY AIRCRAFT, INC.
MOONEY CORPORATION
HAL FRANCIS RACHAL
EDWARD B. HUNNICUTT,
Defendants.

ORDER OF PERMANENT INJUNCTION

IT APPEARING to the Court that defendants HAL FRANCIS RACHAL and EDWARD B. HUNNICUTT have engaged in acts and practices which constitute and will constitute violations of Sections 5 and 17(a) of the Securities Act of 1933, as amended (15 U.S.C. 77e and 77q(a)), and of Section 10(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78j(b)), and Rule 10b-5 promulgated thereunder (17 C.F.R. 240.15b-5), the Court having considered the pleadings, briefs, and evidence herein, and being fully advised of the law, facts and premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants Hal Francis Rachal

and Edward B. Hunnicutt, their agents, servants, employees, attorneys and assigns, and each of them, be and here are permanently enjoined from, directly or indirectly —

1. making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell the common stock of Mooney Aircraft, Inc. or Mooney Corporation or any other security, through the use or medium of any prospectus or otherwise, or to carry or cause to be carried through the mails or in interstate commerce by any means or instruments of transportation any such security for the purpose of sale or for delivery after sale, unless and until a registration statement has been filed with the Securities and Exchange Commission as to such security or while a registration statement filed with the Securities and Exchange Commission is the subject of a refusal order or stop order of the Securities and Exchange Commission or (prior to the effective date of a registration statement) any public proceeding or examination under Section 8 of the Securities Act of 1933 (15 U.S.C. 77h); provided that the foregoing prohibitions shall not apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act of 1933 (15 U.S.C. 77e);

2. making use of the means or instruments of transportation or communication in interstate commerce or of the mails to employ any manipulative or deceptive device, scheme or artifice to defraud,

or to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of the common stock of Mooney Aircraft, Inc., Mooney Corporation, or any other security, or to obtain money or property by means of any untrue statement of a material fact or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading concerning —

a. the financial condition of the issuer;

b. the price of the security being sold;

c. the activities and operations of the issuer; or any other untrue statements or omissions of similar purport or object.

ENTERED this 27th day of March, 1969.

s/ Ernest Guinn

UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court
FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

GROVER C. HILL ET UX, on behalf of themselves and all stockholders of Mooney Corporation and Mooney Aircraft, Inc.,
Plaintiffs,

vs.

HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,
Defendants,

and

GROVER C. HILL ET UX, derivatively on behalf of Mooney Corporation and Mooney Aircraft, Inc.,
Plaintiffs,

vs.

HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,
Defendants,

CIVIL ACTION No. SA69CA21

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on motion of plaintiff for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and to declare a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. All parties were present by their respective counsel of record and hearing was held before the Court on September 16, 1969, on said motions. The Court having considered the pleadings, affidavits, exhibits and depo-

sitions filed herein, the arguments and briefs of counsel, including admissions made therein, and the whole record herein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

This is an action brought in two counts by stockholders of Mooney Corporation and Mooney Aircraft, Inc., against Hal Francis Rachal and Edward B. Hunnicutt, former officers of said corporation, pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. Count One alleges a cause of action by the plaintiff as a class action against the defendants to recover sums of money paid in connection with purchases of common capital stock of the said corporations, which sales by the defendants were made in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Count Two seeks to recover derivatively on behalf of the said corporations sums of money paid to the defendants by the corporations for the purchase of common capital stock of the said corporations from the defendants, which sales were made in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

2.

This Court has jurisdiction of the causes of action pursuant to Section 22(a) of the Securities

Act of 1933 and Section 27 of the Securities Exchange Act of 1934. Venue is in the Western District of Texas in that all defendants reside therein and the causes of action arose therein.

3.

The Court finds that at all material times the plaintiffs were stockholders of Mooney Corporation and its subsidiary, Mooney Aircraft, Inc.

4.

The Court finds that prior to the filing of the instant case, the defendants were defendants in a case styled Securities and Exchange Commission, Plaintiff vs. Mooney Aircraft, Inc., Mooney Corporation, Hal Francis Rachal, Edward B. Hunnicutt, Defendants, Civil Action No. SA 69-CA-4 in the United States District Court for the Western District of Texas. With respect to said case, the Court finds:

(A) The issues of fact presented in the Complaint filed by the Securities and Exchange Commission with respect to violations of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder are identical to the fact issues contained in plaintiff's complaint herein;

(B) That the aforesaid case brought by the Securities and Exchange Commission was determined by the Court after a full and fair trial of the said identical issues and the defendants had full opportunity to present their defenses therein;

(C) That the said action brought by the Securities and Exchange Commission resulted in an adjudication thereon in which this Court, by order entered March 27, 1969, determined that the said defendants violated the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder with respect to the issues therein which are identical to the issues raised by plaintiff's complaint herein;

(D) The Defendants herein have not presented to the Court any new, other, or different evidence than presented by them in the trial of the action brought by the Securities and Exchange Commission and have not indicated to the Court that any such evidence exists which could not have been produced in the former trial.

WITH RESPECT TO COUNT ONE (CLASS ACTION):

5.

The Court finds that the plaintiffs are owners of one hundred (100) shares of common capital stock Certificate No. 2959 of Mooney Corporation. The plaintiffs purchased said stock of Mooney Aircraft, Inc., in September, 1963, within the meaning of Section 3(a)(13) of the Securities Exchange Act of 1934 and Section 2(3) of the Securities Act of 1933; the said common capital stock was converted without their consent on March 5, 1968, to 100 shares of common capital stock of Mooney Corporation by the defendants.

6.

The plaintiff paid a total of $1,285.30 to purchase the said shares of common capital stock. Plaintiffs purchased said common capital stock from the defendants.

7.

The Court finds that the plaintiffs did not know or have reason to know or suspect that the aforesaid common capital stock was sold to them by the defendants in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder until January 16, 1969, at which time the Securities and Exchange Commission filed its complaint against the defendants referred to above.

8.

The Court finds that the class which the plaintiffs seek to represent do not present common questions of fact and law since some members of the class were deceived by the defendants by false representations and others were deceived by the failure of the defendants to disclose material facts.

WITH RESPECT TO COUNT TWO (DERIVATIVE ACTION):

9.

The Court finds that prior to the filing of the complaint herein, the plaintiffs requested the Board of Directors of Mooney Corporation and Mooney Aircraft, Inc., by letter dated January 21, 1969, to institute suit against the defendants on the causes

of action alleged in the complaint. The corporations responded to the plaintiffs in a manner indicating that they did not intend to bring suit against the defendants. A list of shareholders was not available to the plaintiffs and efforts to solicit shareholder participation would have been inordinately difficult and unreasonable. The Court finds that plaintiffs complied with the provisions of Rule 23.1 of the Federal Rules of Civil Procedure prior to the institution of this suit.

10.

The Court finds that defendant Rachal sold 11,000 shares of Mooney Aircraft, Inc., to said corporation in 1965 for $14.00 per share, totalling $154,000.00; and, in 1966, sold 20,000 shares of Mooney Aircraft, Inc., to said corporation for $15.00 per share, totalling $300,000.00. The value of said shares of common capital stock was zero. Said sales were in violation of the Securities Act of 1933, the Securities Exchange Act of 1934 and Rule 10b-5 thereunder as established in the aforesaid litigation brought by the Securities and Exchange Commission.

11.

The Court finds that defendant Hunnicutt sold 390 shares of Mooney Corporation to said corporation in 1966 for $14.00 and $15.00 per share, totalling $5,960.00. The true value of said securities was zero. Said sales were in violation of the Securities Act of 1933, the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder as established in

the aforesaid litigation brought by the Securities and Exchange Commission.

ATTORNEYS' FEES:

12.

The Court finds that the attorneys for the plaintiff have pursued said cause with diligence and expertise, and spent a total of 79.5 hours and have expended a total of $317.96 as expenses. The Court finds that a reasonable attorney's fee is 20% of the total judgment to be rendered herein, which sum should be apportioned to the attorneys for the plaintiffs.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction pursuant to Section 22(a) of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934.

2.

The Court finds that the purchases and sales of the common capital stock of Mooney Aircraft, Inc., and Mooney Corporation referred to herein violated the Securities Act of 1933, the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder, and the defendants are estopped to deny violation thereof. Plaintiff's Motion for Summary Judgment should be granted.

3.

The Court finds with respect to Count One that

judgment should be granted to the plaintiffs and against the defendants jointly and severally in the amount of $1,285.30.

4.

The Court finds with respect to Count One that plaintiff's motion to declare a class action should be denied.

5.

The Court finds with respect to Count Two that plaintiffs on behalf of Mooney Corporation and Mooney Aircraft, Inc., should recover judgment against defendant Rachal in the sum of $454,000.00 and against defendant Hunnicutt in the sum of $5,960.00.

6.

The Court finds that 20% of the judgment rendered derivatively on behalf of Mooney Aircraft, Inc., and Mooney Corporation, together with expenses, should be apportioned to the attorneys of record for the plaintiffs as reasonable attorneys' fee.

ENTERED this 20 day of January, 1970.

s/ Ernest Guinn

UNITED STATES DISTRICT JUDGE

(Seal)

APPENDIX D

United States District Court
FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

GROVER C. HILL ET UX, on behalf of themselves and all stockholders of Mooney Corporation and Mooney Aircraft, Inc.,
Plaintiffs,
vs.
HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,
Defendants,
and
GROVER C. HILL ET UX, derivatively on behalf of Mooney Corporation and Mooney Aircraft, Inc.,
Plaintiffs,
vs.
HAL FRANCIS RACHAL AND EDWARD B. HUNNICUTT,
Defendants,

CIVIL ACTION No. SA69CA21

FINAL JUDGMENT

In connection with the findings of Fact and Conclusions of Law entered by the Court simultaneously herewith, the Court, upon consideration of the pleadings, exhibits, depositions, briefs and arguments of counsel, finds as follows:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff's Motion to Declare Class Action be, and it is herewith, denied.

IT IS FURTHER ORDERED, ADJUDGED and

DECREED that Plaintiffs' Motion for Summary Judgment be, and it is herewith, granted.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiffs GROVER C. HILL, et ux. do have and recover of and from defendant Hal Francis Rachal and defendant Edward B. Hunnicutt, jointly and severally, the sum of ONE THOUSAND TWO HUNDRED EIGHTY-FIVE AND 30/100 ($1,285.30) DOLLARS, together with interest at the rate of 6% per annum from this date until paid, and judgment is herewith rendered for same, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiffs GROVER C. HILL, et ux., derivatively on behalf of and for the benefit of Mooney Aircraft, Inc., and Mooney Corporation, do have and recover of and from defendant Hal Francis Rachal the sum of FOUR HUNDRED FIFTY-FOUR THOUSAND ($454.000.00) DOLLARS, together with interest thereon until paid, and judgment is herewith rendered for same, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Grover C. Hill, et ux., derivatively on behalf of and for the benefit of Mooney Corporation and Mooney Aircraft, Inc., do have and recover of and from defendant Edward B. Hunnicutt the sum of FIVE THOUSAND NINE HUNDRED SIXTY ($5,960.00) DOLLARS, together with interest at the rate of 6% per annum from

this date until paid, and judgment is herewith rendered for same, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the law firm of MULLINAX, WELLS, MAUZY & COLLINS be, and they are herewith, awarded as reasonable attorneys' fee 20% of the judgment rendered derivatively for MOONEY AIRCRAFT, INC., and MOONEY CORPORATION against defendants RACHAL and HUNNICUTT, and expenses in the amount of $317.96, which sum is herewith apportioned to the law firm of Mullinax, Wells, Mauzy & Collins and deducted from the judgment heretofore rendered derivatively for Mooney Aircraft, Inc., and Mooney Corporation, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiffs be, and they are herewith granted their costs of this action, and judgment is herewith rendered against the defendants jointly and severally for same, for all of which let execution issue.

ENTERED this 20 day of January, 1970.

s/ Ernest Guinn

UNITED STATES DISTRICT JUDGE

(Seal)

APPENDIX E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29585

HAL FRANCIS RACHAL and EDWARD B. HUNNICUTT,
Defendants-Appellants,

versus

GROVER C. HILL ET UX, on behalf of themselves and all stockholders of Mooney Corporation and Mooney Aircraft, Inc.,

and

GROVER C. HILL ET UX, derivatively on behalf of Mooney Corporation and Mooney Aircraft, Inc.,
Plaintiffs-Appellees.

Appeal from the United States District Court for the Western District of Texas

(December 3, 1970)

Before GEWIN, MORGAN and ADAMS,*
Circuit Judges.

*Of the Third Circuit, sitting by designation.

MORGAN, Circuit Judge. This is an appeal from an order of the District Court for the Western District of Texas granting summary judgment in favor of appellee Hill in an action brought by Hill in behalf of himself and his wife, individually, and as a representative of all the stockholders in Mooney

Corporation and Mooney Aircraft, Inc., and derivatively, in behalf of the two corporations, against appellants Hal Francis Rachal, the Chairman of the Board and President of both corporations, and Edward B. Hunnicutt, their Secretary-Treasurer, to recover damages sustained as a result of violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), Rule 10b-5, 17 CFR 240.10b-5, promulgated thereunder, and Section 5 of the Securities Act of 1933, 15 U.S.C. §77e.

The complaint alleges that the appellants Rachal and Hunnicutt engaged in a manipulative scheme whereby, *inter alia,* they "arbitrarily set the price for the common capital stock of the . . . corporations at a constantly increasing, artificially inflated value without consideration for the financial conditions of . . . [the] corporations and other factors affecting the aforesaid securities"; "caused the . . . corporations to place a restrictive legend on the stock certificates to enable [them] to manipulate the market price for securities owned by them in [the] corporations and to give them, as controlling persons, the opportunity to remove their personal money from the said corporations at various times when they knew cash was available in the corporate treasuries"; and then resold common stock to the corporations for the artificially established price. Further, the complaint alleges that the appellants willfully failed to disclose material facts with regard to this arrangement and the true financial position of the corporations in connection with the stock purchase made by Hill and the other pur-

chasers of the class he seeks to represent, in violation of Section 10(b) and Rule 10b-5. Finally, the complaint alleges that the appellants willfully failed to file a statement registering the issuance of the common stock sold to Hill and the other purchasers with the Securities and Exchange Commission as required by Section 5 of the Securities Act of 1933, supra.

Prior to the filing of this action, the Securities and Exchange Commission filed a complaint against Mooney Aircraft, Inc., and Mooney Corporation and the appellants, alleging that the same manipulative scheme described above and other related conduct complained of in the instant case was violative of Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. §§77e and 77q(a), Section 10(b) of the Securities Exchange Act of 1934, supra, and Rule 10b-5 thereunder, supra, and sought to enjoin its continuance.[1] A final judgment of permanent injunction was entered by consent against the corporations on January 20, 1969. Rachal and Hunnicutt demanded and received a trial on the issues, after which the district court, sitting without a jury, entered an order of permanent injunction, on March 27, 1969, predicated on a finding "that Hal Francis Rachal and Edward B. Hunnicutt have engaged in acts and practices which constitute and will constitute violations of Sections 5 and 17(a) of the Securities Act of 1933, as amended (15 U.S.C. 77e and 77q(a)), and of Section 10(b) of the Se-

[1] *Securities and Exchange Commission* v. *Mooney Aircraft, Inc., Mooney Corporation, Hal Francis Rachal and Edward B. Hunnicutt,* Civ. Action No. SA69CA-4 (W.D. Tex.).

curities Exchange Act of 1934, as amended (15 U.S.C. 78j(b)), and Rule 10b-5 promulgated thereunder (17 C.F.R. 240.15b-5) [sic.] . . .".

In its Findings of Fact and Conclusions of Law entered in conjunction with the order granting summary judgment, the district court found that the issues of fact presented by the S.E.C. complaint with respect to violations of the security laws of the United States and the fact issues presented by the complaint in the instant action are identical; that the appellants had a full and fair trial, with full opportunity to present their defenses, on the identical issues in the prior S.E.C. injunction action; and that the appellants presented no new, other or different evidence than was presented by them in the prior S.E.C. action and failed to indicate that any such evidence exists which could not have been produced in the former trial. On this basis, the district court held as a matter of law that the appellants were collaterally estopped to deny that their conduct violated the security laws of the United States and that the appellees were entitled to summary judgment on the issue of liability. The district court also granted summary judgment on the issue of liability. The district court also granted summary judgment on the other issues presented, awarding $1,285.30 to appellant Hill, that amount being the purchase price of the shares of stock acquired by Hill; dismissing the class action for failure to present common questions of fact; and awarding Mooney Aircraft, Inc., and Mooney Corporation $454,000.00 from appel-

lant Rachal, representing the amount he and members of his family received from the resale of stock to the corporations, and $5,960.00 from appellant Hunnicutt, representing what he received from the resale of stock to the corporations.

The principal issue presented by this appeal is whether the district court was correct in holding that the finding that the appellants had violated the security laws of the United States in the S.E.C. injunction action precluded the relitigation of that issue in the present case under the doctrine of collateral estoppel. The appellants contend that since Hill, the plaintiff below, was a stranger to the S.E.C. injunction action, he cannot assert the adverse determination of liability issue in that action against the appellants in the present action in the face of the requirement that collateral estoppel be mutual. Secondly, they contend that the doctrine of collateral estoppel may not be invoked to deprive them of a trial by jury on the issue of their civil liability.

Although many states still honor the rule of mutuality of estoppel,[2] the modern trend has been to discard the rule and preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the prior action. See *DeWitt* v. *Hall*, 19 N.Y. 2d 141, 278 N.Y.S. 2d 596, 225 N.E. 2d 195,

---

[2] See Annot. 31 A.L.R. 3d 1044, 1059-1067 and the cases cited therein.

31 A.L.R. 3d 1035 (1967).[3] The federal rule comports with the modern trend and thus it is clear that the requirements of mutuality need not be

---

[3] The leading case in *Bernhard* v. *Bank of America National Trust & Savings Association*, 19 Cal. 2d 807, 122 P.2d 892 (1942), in which Justice Traynor, speaking for the court, said:

> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. * * * Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted [citing cases].
>
> * * * *
>
> In determining the validity of a *plea of res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 19 Cal. 2d at 812-813, 122 P. 2d at 895.

In commenting on the *Bernhard* Doctrine in a frequently cited article, Professor Currie has stated:

> There is no virtue in the mutuality requirement as such. The basic doctrine of the *Bernhard* case is sound. In general, one who was not a party to the prior action should be allowed to plead the former judgment against one who was a party, or in privity with a party, to the prior action, and this is true irrespective of whether the plea is asserted as the basis for a claim or as a defense. This principle furthers the policy against repeated litigation on the same issue by the same party. But the principle is limited in two distinct ways. First, it should not be applied, and the plea should not be allowed, where the result would be to create an anomaly such as would occur in the [mass tort] type of situation, where the party against whom the plea is asserted faces more than two successive actions. Second, since the principle assumes that the party against whom the plea is asserted has had a full and fair opportunity to litigate the issue effectively, the principle should not be applied, and the plea should not be allowed, where, by reason of his former adversary's possession of the initiative, he has not had such an opportunity.

Currie, "Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine", 9 Stan. L. Rev. 281, 308 (1957).

Although Currie's reservations have been applied in some cases, see *e.g. Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 2 Cir., 1965, 346 F. 2d 532, cert. den. 382 U.S. 983, Currie has withdrawn his reservations in Currie, "Civil Procedure, The Tempest Brews", Calif. L. Rev. 25 (1965), stating:

> [The *Bernhard* Doctrine] has no need of reservations conceived and phrased as rules of thumb by those of little faith. It need be read subject to only one reservation — one that Justice Traynor unquestionably had in mind when he wrote, and one that should have been obvious to all who had doubts about the generality of the new criteria: No legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice. At 37.

See also, Semmel, "Collateral Estoppel, Mutuality and Joinder of Parties", 68 Column. L. Rev. 1457 (1968); Annot. 31 A.L.R. 3d 1044 (1970).

met for collateral estoppel to be applied in an action presenting a federal question in the courts of the United States. *Bruszewski* v. *United States,* 3 Cir., 1950, 181 F. 2d 419, cert. den. 340 U.S. 865; *United States* v. *United Air Lines, Inc.,* D. Nev., 1962, 216 F. Supp. 709, aff'd. sub nom., *United Air Lines, Inc.* v. *Wiener,* 9 Cir., 1964, 335 F. 2d 379, 404-405, (adopting dist. court opinions as to collateral estoppel) cert. den. 379 U.S. 951. Although this circuit has never before been asked to abandon the requirement of mutuality of estoppel as a matter of federal law, we have followed the trend in the recent Texas diversity case of *Seguros Tepeyac, S. A., Compania Mexicana* v. *Jernigan,* 5 Cir., 1969, 410 F. 2d 718, cert. den. 396 U.S. 905.

This is not to say, however, that a party who receives an adverse determination of an issue in prior litigation will be forever estopped from relitigating that issue under all circumstances. While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case. See *United States* v. *Weber,* 3 Cir., 1968, 396 F. 2d 381, 389; *Graves* v. *Associated Transport, Inc.,* 4 Cir., 1965, 344 F. 2d 894 (Virginia law). As Judge Hastie of the Third Circuit stated in the

leading federal case of *Bruszewski* v. *United States,* supra, 181 F. 2d at 421:

> ...a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so *unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.* (Emphasis supplied.)

Although there are serious doubts as to the appropriateness of allowing a judment in injunctive proceedings brought by the federal government to prevent future violations of the security laws to become *res judicata* as to the liability of the same defendant in a civil action for damages resulting from past violations, when asserted by a private party who was a stranger to the prior action, *cf. Fox Publishing Co.* v. *United States,* 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed. 2d 604 (1961), we do not rest our decision on these grounds.

It is clear that had it not been for the prior adverse determination of the issue of liability by the district court sitting without a jury in the S.E.C. injunction proceeding, the appellants would have been, without question, entitled to a trial by jury as a matter of right under the Seventh Amendment to the United States Constitution and Rule 38,

Federal Rules of Civil Procedure.[4] The central question thus presented is whether a litigant can lose his constitutional right to a trial by jury by estoppel when the issue to be decided has been adjudicated adversely to him in a prior proceeding at which there was no right to a trial by jury and his present adversary was not a party.

Although we find no case directly in point,[5] there is a plethora of analogous cases holding under the Seventh Amendment that whenever an equitable claim and a legal claim, the resolution of which depend on the determination of a common factual issue, are joined in the same action, the common issue must be first tried before a jury, even if the equitable claim was brought first or if the legal claim is merely incidental to the equitable. See Annot. 17 A.L.R. 3d 1321 and cases cited therein. In the leading case of *Beacon Theatres* v. *Westover,*

---

[4] The appellees, plaintiffs below, demanded a trial by jury on all issues in accordance with Rule 38, supra, and while the appellants, defendants below, did not, they were entitled to rely on this demand since "[a] demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties". Rule 38(d), supra. See *Collins* v. *Government of Virgin Islands,* 3 Cir., 1966, 366 F. 2d 279, cert. den. 386 U.S. 958.

[5] The case of *Painters Dist. Coun. No. 38, etc.* v. *Edgewood Contracting Co.,* 5 Cir., 1969, 416 F. 2d 1081, is cited by the Appellants as an example of a denial of a trial by jury as a result of the application of the doctrine of collateral estoppel. There a prior unfair labor practice adjudication before the National Labor Relations Board which was adverse to the union and at which both the union and the employer were parties was held to estop the union from relitigating the same issue in a subsequent §303 suit brought against the union by the employer. However, this case is distinguishable on several grounds: the parties were the same in both proceedings, and thus it was not unlike the situation in many cases holding that a prior decree in equity works a collateral estoppel to a subsequent adjudication of the same issues in an action at law between the same parties, regardless of the right to a jury trial in the law action, see e.g. *Kelleher v. Stone & Webster,* 5 Cir., 1935, 75 F. 2d 331, nor did it raise the special considerations required to insure justice in cases where mutuality of parties is lacking; secondly, the issue of whether there was a right to trial by jury on the issues whose adjudication was held to be estopped was never raised.

359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988 (1959), the plaintiff brought an action seeking declaratory relief and for an injunction to prevent the defendant from bringing a treble damage antitrust action against it. The defendant asserted his compulsory counterclaim for damages and demanded a trial by jury. At the heart of each claim was the issue of whether a certain contract to which the plaintiff was a party was violative of the antitrust laws of the United States. The district court ordered that the equitable matters be tried first before the court without a jury and the defendant sought a writ of mandamus. After noting that if the equitable issues were tried first the doctrine of *res judicata* would most likely preclude further litigation of the same issues in the subsequent proceedings before a jury, the Supreme Court held:

> If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, whenever possibble, be exercised to preserve jury trial. As this court said in Scott v. Neely, 140 U.S. 106, 109, 110, 35 L.Ed. 358, 360, 11 S.Ct. 712: "In the Federal courts this [jury] right cannot be dispensed

> with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determinations of equitable claims. (Footnotes omitted.) At 509.

Similarly, in a copyright case, the court held that the right to trial by jury under the Seventh Amendment is not lost merely because legal issues are joined to or are incidental to equitable issues. *Dairy Queen* v. *Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962). See *Thermo-Stitch, Inc.* v. *Chemi-Cord Processing Corp.,* 5 Cir., 1961, 294 F. 2d 486; *Oklahoma Contracting Co.* v. *Magnolia Pipe Line Co.,* 5 Cir., 1952, 195 F. 2d 391, 396, cert. den. 344 U.S. 921.

In light of the great respect afforded in *Beacon Theatres,* supra, and its progency, for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose

in a different context from the present action. *Beacon Theatres,* supra, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability.

The appellants also contend that summary judgment was erroneously granted because the verified complaint and certain supporting affidavits were not made on personal knowledge of the affiants as to the facts that would be admissible in evidence and do not show affirmatively that the affiants are competent to testify to the matters stated therein as required by Rule 56(e) of the Federal Rules. Although we see no lack of compliance with the requirements of Rule 56(e), it does appear that the district court failed to find that there were no genuine issues of material fact as required by Rule 56(c), but instead entered Findings of Fact and Conclusions of Law as required by Rule 52. For this reason we must vacate the district court's order of summary judgment, and, in view of the result we have reached on the application of collateral estoppel, remand for further proceedings in

accordance with Rule 56(d) in which the district court shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted and shall thereupon make an order specifying the facts that appear without substantial controversy, with particular regard to the amount of damages and the defense of limitations, before proceeding to trial. *Hindes* v. *United States,* 5 Cir., 1963, 326 F. 2d 150, cert, den. 386 U.S. 992; *Neff Instrument Corporation* v. *Cohu Electronics, Inc.,* 9 Cir., 1959, 269 F. 2d 668.

Finally, the appellants contend that the securities involved in this case were exempted from application of the federal security laws by §3 of the Securities Act of 1933, as amended, 15 U.S.C. §77c, since they were short term commercial paper which had a maturity at the time of issuance not exceeding nine months. This contention is without merit. Since no notification was filed with the S.E.C. according to S.E.C. Rule 225, Regulation A, no exemption for the securities can be established. *Mines and Metals Corp.* v. *Securities and Exch. Comm'n.,* 9 Cir., 1952, 200 F. 2d 317, cert den. 345 U.S. 941. Likewise, the appellants' contention that the transactions here in question were exempt under §4 of the 1933 Act, as amended, 15 U.S.C. §77d, as not involving any public offering is unsupportable as a matter of law. *Securities & Exchange Com.* v. *Ralston Purina Co.,* 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). This may be reflected in any

order the district court may enter pursuant to Rule 56(d).

The judgment of the district court granting summary judgment is vacated and remanded for a trial before a jury on the issue of liability and for further proceedings under Rule 56(d) on the issues of damages and the defense of limitations.

VACATED AND REMANDED.